SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 274

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PRELIMINARY STATEMENT

This is a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment enforcing an order of the National Labor Relations Board. (157 N.L.R.B. No. 17.) The judgment of the Court of Appeals is dated April 28, 1967. It was entered the same date. Copies of the opinion of the Court of Appeals and its decree are appended hereto. The opinion is reported in .....

F.2d ..... and in 55 LC No. 11,878. Rehearing was not requested. Jurisdiction of this court rests upon Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. § 160(e), et seq.) and upon Section 1254 of Title 28 United States Code.

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Is the purchaser of a unionized business free to hire his own employees, or is he required to bargain with the collective bargaining representative of the seller's employees regarding the continuity of their employment?

2. What is, or what are the criteria for, "substantial continuity of identity in the business enterprise", within the meaning of *John Wiley & Sons v. Livingston*, 376 U. S. 543 (1964)?

STATUTES INVOLVED

The statutory provisions which this case involves are portions of the National Labor Relations Act, as amended (29 U.S.C. § 151, et seq.) and are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to en-

gage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer——

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

STATEMENT OF THE CASE

In April, 1964, William Young and Charles John Young, who are brothers, purchased from Hob Nob Stores, Inc., d/b/a Kelley's Markets, three retail supermarkets in Bakersfield, California. Hob Nob operated thirty other supermarkets and was part of a large corporate complex. (Tr. 243-244.) The Youngs organized a corporation, petitioner herein, to operate

the stores. (Tr. 283.) At the request of the Youngs, Hob Nob terminated its employees. (Tr. 247.) Hob Nob closed the stores. (Tr. 249.) The stores remained closed for a day and reopened the following day under the Youngs' management.

The three stores were operating at a loss at the time of the sale. (Tr. 284.)

Hob Nob had a collective bargaining agreement with Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The agreement covered the meat department employees in the three stores purchased by the Youngs and was effective until January, 1965. (G. C. Exh. No. 2.) However, Local 193 had not been certified as the collective bargaining representative of the employees. (Tr. 274-275.)

The Youngs hired new employees and new supervisors. (One Hob Nob grocery department supervisor was retained, but none in the meat department.)

After the sale Local 193 requested petitioner to honor the agreement. Upon Petitioner's refusal to do so, Local 193 first requested arbitration (G. C. Exh. No. 4) but later withdrew the request and invoked the processes of the National Labor Relations Board.

The General Counsel of the National Labor Relations Board charged in a consolidated complaint (R. 10) that petitioner had caused Hob Nob to discharge its employees because petitioner desired to avoid Hob Nob's collective bargaining obligations, that petitioner had failed to recall the employees, that it was the

"successor" to Hob Nob for the purposes of the National Labor Relations Act, and that it had refused to bargain with Local 193.

The General Counsel's contentions were accepted by the Board. (R. 52.) The discharges were found to violate § 8 (a) (3) of the National Labor Relations Act, and the refusal to bargain to violate § 8 (a) (5). (29 U.S.C. § 158 (a) (3), (5).) The remedy ordered was reinstatement with back pay for the discharged Hob Nob employees and recognition of and bargaining with the union.

The Board's order is based on its finding that petitioner violated the Act by causing the discriminatory discharge of Hob Nob employees. The Board made no finding of mass discriminatory refusal by petitioner to hire Hob Nob employees who applied to it for employment.

Petitioner argued in the Court of Appeals that it was free to hire its own employees and that its decision to do so rather than to continue *en masse* the employment of Hob Nob's employees was a matter of management prerogative irrespective of motive. Petitioner also argued that since it employed none of Hob Nob's employees in the appropriate unit, it was not Hob Nob's "successor" within the meaning of the Act. Petitioner pointed out that it neither had been charged with nor found to have committed (except in a single instance) discriminatory refusal to hire.

The Court of Appeals rejected petitioner's arguments, reasoning that under the doctrine of *John*

Wiley & Sons v. Livingston, supra, the right to continued employment does not automatically terminate on change in ownership and that petitioner was obligated to bargain with Local 193 regarding the continuity of employment. It also reasoned that since the Hob Nob employees were entitled to continuity of employment petitioner could not argue that it was not Hob Nob's "successor" because it had not employed them.

The Court of Appeals had jurisdiction pursuant to the provisions of Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. § 160(e), et seq.)

ARGUMENT

Whether the purchaser of a business is required to bargain collectively with the collective bargaining representative of the seller's employees regarding continuity of employment of the seller's employees presents an important question of federal law which has not been, but should be, settled.

Plainly stated, the holding of the Court of Appeals in this case is that a purchaser purchases the seller's contractual obligations with respect to the seller's employees and is not free to hire his own employees. The Court of Appeals concluded that the purchaser is not entitled to request the seller to terminate its employees upon the sale, or at least is not entitled to

request that in order to avoid the seller's union obligations.

Petitioner submits that the Court of Appeals has placed an unnecessary, and in some cases fatal, restraint on the free alienation of business enterprises or parts thereof. As stated by Member Jenkins of the National Labor Board, dissenting in *Chemrock Corporation,* 151 NLRB No. 111 (1965):

> "If a prospective buyer is not free to structure a new enterprise in such manner as will in his judgment convert a failing or non-profitable operation into a competitive and profitable venture, the likelihood that a business may be shut down or sharply curtailed by the prospective seller becomes greater. Compelling a purchaser to hire the employees of the seller further encumbers stagnant and unprofitable enterprises by reducing the flexibility available to prospective buyers and tends to foreclose any rejuvenation which might result from sales to new owner-managers."

If the buyer cannot eliminate objectionable economic restrictions of the seller's operation he likely will not make the purchase, and in many cases, this will leave the seller to plod along to a certain death.

It has been recognized that some employer decisions are so peculiarly matters of management prerogative that they may be made without violating the Act no matter what the motivation. *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965). See also *N. L. R. B. v. New England Tank Industries,* 302

F.2d 273, 276 (C.A. 1, 1962); *Jays Foods Inc.*, 292 F.2d 317, 320 (C.A. 7, 1961). Absent a finding of discriminatory refusal to hire applicants for work, a decision by a purchaser to hire his own work force is or should be such a matter.

In many cases the experience of the seller's employees will be more important to the buyer than the restrictions of the seller's contractual obligations. In such cases, the buyer will hire the seller's employees. However, in other cases the restrictions, if unavoidable, will prevent the buyer from "getting off the ground", so to speak, to begin with.

The effect of petitioner's contention would be to strike a balance between the interests of management and labor. In purchasing a business management could make a management decision to retain the employees of the seller, as such, or to hire a new work force. The restrictions of § 8 (a) (3) of the Act would prevent management from discriminating between union and non-union applicants for employment. Other provisions of the Act would afford labor the opportunity to organize the work force hired and to represent it upon majority designation.

Petitioner's contention has been recognized by the Board in the past. In *Tennsco Corp.*, 141 NLRB No. 21 (1963), the Board adopted the conclusion of its Trial Examiner that a purchaser "had no duty to hire any particular employees", and in *Bedford-Nugent Corp.*, 151 NLRB No. 26 (1965), it concluded that the

purchasers "were not obliged to give preference to the former Bedford-Nugent employees over other or subsequent applicants for employment".

Although the right to life, liberty, and the pursuit of happiness includes the right to work and earn an honest living, it does not include the right to work for any particular employer without his consent since a man's right to work stops short of the employer's right not to hire him. *Van Zandt v. McKee,* 202 F.2d 490 (C.A. 5, 1953).

If petitioner was free to elect to hire its own work force, and it did so, was there nonetheless a "substantial continuity of identity in the business enterprise" within the meaning of *John Wiley & Sons v. Livingston,* supra?

The principle of *Wiley,* a corporate merger case, is that consistent with the federal policy of settling labor disputes by arbitration rather than by tests of strength of contending forces, a "successor employer" is, in appropriate circumstances, bound by the arbitration clause of a collective bargaining agreement signed by the predecessor employer. The appropriate circumstances are "continuity of identity in the business enterprise". To date, however, the Court has neither clearly defined the concept nor laid down any indispensable criteria of continuity. The matter is one of continuing concern to practitioners representing both labor and management. It is of particular concern since in *Wackenhut Corp. v. Plant Guard*

Workers, 332 F.2d 954 (C.A. 9, 1964), and *Steelworkers v. Reliance Universal,* 335 F.2d 891 (C.A. 3, 1964), the *Wiley* doctrine was applied by Courts of Appeals to purchase, rather than merger, situations, and since the decision of the Court of Appeals herein applies it to representation as well as arbitration despite the admonition of the Court in *Wiley* that "we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in owership". (376 U.S. 543, at 551.)

Petitioner submits that one indispensable criteria of continuity is employment by the "successor" of at least a significant number of the employees of the predecessor. Cf. *Hotel & Restaurant Employees v. Joden,* ..... F. Supp. ....., 54 LC No. 11,679 (Dist. Mass., Dec. 30, 1966.) In other words one is not a successor if he has none of the employees of his predecessor. While the type of the business may remain unchanged (i.e. grocery store, restaurant or manufacturing plant), the *raison d'etre* of the Act is the employer-employee relationship. That relationship is a most important element in determining continuity. *N. L. R. B. v. Alamo White Truck Service,* 273 F.2d 238, 242. (C.A. 5, 1959.) If there is a change in that relationship, then it would seem that there has been a break in continuity.

Numerous decisions by the Board have required a purchaser to bargain with the representative of the

seller's employees. In such cases the seller's employees became the buyer's employees. In most of the cases there was no change in supervision. *Chemrock Corporation,* supra; *Randolph Rubber Co.,* 152 NLRB No. 46 (1965); *Hemisphere Progressive Corp.,* 154 NLRB No. 65 (1965); *Paramount Paper Products,* 154 NLRB No. 89 (1965); *Sinko Mfg. & Tool Co.,* 154 NLRB No. 117 (1965); *West Suburban Transit Lines,* 157 NLRB No. 77 (1966); and *William E. McClain,* 158 NLRB No. 18 (1966).

However, where the seller's employees did not become the buyer's employees, the result has been to the contrary. *Triumph Sales, Inc.,* 154 NLRB No. 71 (1965); *San Francisco Metal Products,* 155 NLRB No. 27 (1965); and *Alabama Precast Products Co., Inc.,* 163 NLRB No. 99 (1967).

In *N. L. R. B. v. John Stepp's Friendly Ford, Inc.,* 338 F.2d 833 (C.A. 9, 1964), a substantial change of identity in the work force precluded a purchaser of a business from being a successor employer. *Stepp's Friendly Ford* is distinguished by the Court of Appeals on the grounds that herein the discharge of the seller's employees was an unfair labor practice. That is true, however, only if petitioner was not free to elect to hire its own work force.

If a buyer purchases the seller's contractual obligations with respect to the seller's employees and is not free to avoid those obligations by hiring his own employees, the basic premise of the Court of Appeals in this case, then as a practical matter, almost every

purchaser of a going unionized business is a "successor" *ipso facto*. The result has wide implications, and again, presents an important question of federal law which should be settled.

Dated, Coalinga, California,
May 22, 1967.

Respectfully submitted,
FRAME & COURTNEY,
TED R. FRAME,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 20,827

[April 28, 1967]

On Petition to Review and Petition to Enforce an Order of the National Labor Relations Board

Before: HAMLIN, JERTBERG and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

Petitioner seeks review of an order of the National Labor Relations Board, and the Board cross-petitions for enforcement of its order. 157 N.L.R.B. No. 17 (1966). At issue is the question whether petitioner, as purchaser of a retail food marketing enterprise, became bound by certain collective bargaining obligations of its predecessor.

Hob Nob Stores, Inc., a large retail grocery chain, owned three supermarkets in or near Bakersfield, California, operated under the name of "Kelley's Markets." In April 1964, William and John Young, brothers, bought the three stores. Just prior to the sale, at the direction of the Youngs, all Kelley's employees were notified that they were discharged effective on the sale date. The sale was completed, the stores shut down for one day, then reopened, still as "Kelley's Markets." Shortly thereafter, petitioner was organized to operate the stores in its own name. While some innovations in methods of handling and marketing merchandise were introduced, essentially the same business was operated in a similar fashion, at the same locations, and the size and duties of the work force did not change substantially.

The meat departments at Kelley's had been covered by a standard collective bargaining agreement with Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, which by its terms was effective until January 1965.[1] The union demanded recognition by petitioner of its representative status and of the agreement. This was refused by petitioner on the ground of an alleged good faith doubt that the union represented a majority of petitioner's meat department employees.

At the union's behest the Board filed a complaint against petitioner, charging that it had caused Hob Nob to discharge its union employees, that it had failed to recall the employees, that it was the "successor" to Hob Nob for the purposes of the National Labor Relations Act, and that it had refused to bargain with Local 193.

The Trial Examiner and the Board found that there was substantial continuity of identity in the business enterprise, and that petitioner had caused the discharges for unlawful reasons, to evade bargaining obligations with the union. Petitioner was held to be the "successor" to Hob Nob; accordingly the discharges were found to violate §8(a)(3) of the N.L.R.A., and the refusal to bargain to violate §8(a)(5).[2] The remedy ordered was reinstatement with back pay for the discharged personnel and recognition of and bargaining with the union.[3]

Petitioner contends that since a substantial change in the personnel of the work force coincided with the sale, it was not bound to recognize the union as bargaining representative under *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833 (9th Cir. 1964).

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[1]The standard agreement included a Union Shop clause, an acquisition clause providing for jurisdiction over meat departments or markets acquired by the employer in the future, and a change of ownership clause providing for application of the agreement to transferee of the employer. The latter provided for thirty days probationary period for the retention of old employees, and for the survival of seniority, vacation and sick leave credit in any event.

[2]49 Stat. 452 (1935), as amended, 29 U.S.C. §158(a)(3), (5) (1964). Both activities were found to violate 29 U.S.C. §158(a)(1).

[3]The Board did not rule on the General Counsel's contention that petitioner should also be ordered to recognize the existing collective bargaining agreement in its entirety, for the reason that the union did not press this question and expressed a desire to negotiate a new contract.

We cannot agree. Here the record clearly supports the Board's finding that petitioner caused the mass discharge of unit personnel for antiunion reasons. This distinguishes the present case from *Stepp's Friendly Ford.* There the Board merely sought to compel the purchaser to recognize and bargain with the old union, despite a substantial change in the identity of the work force. There was no finding that the discharge of the old employees constituted an unfair labor practice and their reinstatement was not sought. Where, as here, the old employees have been wrongfully discharged, their reinstatement is an appropriate remedy for the unfair labor practice. With such reinstatement ordered, continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate.

Petitioner contends that the mass discharge was of no significance as an unfair labor practice, since the sale in any event would have caused an automatic termination of the old employment relationship.[4]

We find no merit in this contention. *John Wiley & Sons v. Livingston,* 376 U.S. 543, 551 (1964), establishes that where there is substantial continuity of identity in the employing enterprise a change in ownership does not, by operation of law, automatically terminate all rights of the old employees[5] and that such rights

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[4]Petitioner's position is that if an unfair labor practice is to be found in its failure to continue employment of the old employees (or to offer them reinstatement) it must be through a discriminatory refusal to hire. It is well established that §8(a)(3) discrimination refers as well to applicants for employment as to existing employees. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941); *Piasecki Afct. Corp. v. NLRB,* 280 F.2d 575 (3d Cir. 1960), *cert. denied,* 364 U.S. 933 (1961). In the present case there is some evidence of discriminatory refusal to hire, but the Board has made no general finding of such, relying solely on the discharge.

[5]The Supreme Court stated:

> "While the principles of law governing ordinary contract would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract." 376 U.S. at 550.

The Court also observed:

> "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate

may remain the legitimate subject of dispute. Importantly included in such potentially bargainable issues, in our view, is continuity of employment, here expressly provided for in the collective bargaining contract with Hob Nob, see footnote 1, *supra*.

Since the right to continued employment does not automatically terminate on change in ownership, it must terminate by act of the parties and such acts accordingly become relevant. Under the circumstances we see no valid distinction between a discharge by petitioner and a discharge by Hob Nob at petitioner's behest on the eve of the changeover.

Petitioner protests that in determining the existence of substantial continuity of identity in the employing enterprise in the *Wiley* sense, continuity of employment is itself a relevant if not essential factor. We cannot agree under the facts of this case. Petitioner's argument amounts to a bootstrap contention that a discriminatory interruption of employment cannot be challenged since it did in fact occur.

The Board also found discriminatory discharges of two individuals who were not former Hob Nob employees: Imogene Brewton and Jack Baldwin. Petitioner contends that in these instances it was not unlawfully motivated, and that these discharges were made for legitimate business reasons. In our judgment the Board's findings in these respects are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

We conclude that the Board's order is entitled to enforcement. It is so ordered.

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themselves as employers be balanced by some protection to the employees • • •." 376 U.S. at 549.

While the immediate issue was the right to arbitration, the opinion states: "It would be inconsistent with our holding that the obligation to arbitrate survived the merger were we to hold that the fact of the merger, without more, removed claims otherwise plainly arbitrable from the scope of the arbitration clause." 376 U.S. at 554.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,827

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DECREE

Before: Hamlin, Jertberg and Merrill, Circuit Judges.

This Cause came on to be heard upon the petition of K. B. & J. Young's Super Markets, Inc., to review and set aside a certain order of the National Labor Relations Board issued against petitioner on March 1, 1966, and upon cross-petition of the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on January 3, 1967, and has considered the briefs and transcript of record filed in this cause. On April 28, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby,

Ordered, Adjudged And Decreed by the United States Court of Appeals for the Ninth Circuit that K. B. & J. Young's Super Markets, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, (hereinafter called the Union), as the exclusive representative of all its employees in the appropriate unit;

(b) Discriminating against any of its employees in regard to their hire or other tenure and condition of employment, thereby discouraging membership in the Union or any other labor organization;

(c) In any other manner interfering with, restraining or coercing its employees in the right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of its employees in the previously described appropriate unit, with respect to rates of pay, wages, hours of work, and

other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer all employees in the appropriate unit who had employee status in that unit as of April 20, 1964, and offer Jack Baldwin and Imogene Brewton, immediate reinstatement to the positions they held at the time of their respective discharges, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them, all in the manner set forth in the Section of the Trial Examiner's Decision, entitled "the remedy".

(c) Notify the above-named employees if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces;

(d) Preserve and, upon request, make available to the National Labor Relations Board or its agents all records necessary for the computation of backpay which may be due under this Decree.

(e) Post at its plant at Bakersfield, California, copies of the notice attached hereto and marked "Appendix." Copies of said notice to be furnished by the Regional Director of the Thirty-first Region, (Los Angeles, California), shall, after being signed by a representative of the Respondent, be posted immediately upon receipt thereof and maintained for a period

of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Thirty-first Region, in writing, within 10 days from the date of this Decree, what steps Respondent has taken to comply herewith.

Endorsed, Decree filed and Entered
/s/ Wm. B. Luck
Wm. B. Luck
Clerk

A True Copy
Attest:
Wm. B. Luck
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 274

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iv) is not yet officially reported. The Board's decision and order (R. 28-43, 52-53)[1] are reported at 157 N.L.R.B. 271.

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[1] "R." references are to Volume I of the record reproduced for the court below, "Tr." references to the transcript of testimony in Volume II of the record.

JURISDICTION

The decree of the court of appeals (Pet. App. v-viii) was entered on April 28, 1967. The petition for a writ of certiorari was filed on June 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Labor Board was authorized to direct the purchaser of a business to bargain with the union representing a majority of the employees of the business, in circumstances where the purchaser took over the former operation substantially unchanged after directing that the employees be discharged as of the time of sale solely in order to avoid bargaining with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are printed at pp. 2-3 of the petition.

STATEMENT

Until April 1964 Hob Nob Stores, Inc., a large retail grocery chain, owned and operated three supermarkets in Bakersfield, California, under the name of "Kelley's Markets." The meat departments of all three stores were covered by a collective bargaining agreement, effective until January 15, 1965, with Butchers Union Local 193, Amalgamated Meat Cut-

ters and Butcher Workmen of North America, AFL-CIO. (R. 29; Tr. 11-12.) As a result of the union shop clause in the agreement, all of the covered employees were members of the union (R. 37).

In April 1964, William and John Young, brothers, bought the three Kelley stores through the corporate petitioner. At the direction of the Youngs, all of the Kelley employees were notified that they were discharged effective on the sale date (R. 30-31; Tr. 246-247). After the sale was completed and the employees discharged, the stores were closed for one day and then reopened, still as "Kelley's Markets". The business at the stores remained essentially the same and the size and duties of the work force did not change materially (R. 30). Petitioner refused, however, to hire former Kelley employees unless they withdrew from the union (R. 32-33; Tr. 134-136, 209-210, 213-214, 222, 224). The union demanded that petitioner observe the unexpired collective bargaining agreement and recognize the union's representative status; petitioner refused (R. 37; Tr. 31-32, 36-37).

The Labor Board found that petitioner was the successor to Hob Nob and that it had caused the former employees to be discharged in order to avoid dealing with the union. It held that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act by causing the discharges [2] and Section 8(a)(5) and (1) by refusing to bargain with

[2] The Board also found that petitioner had further violated Section 8(a)(3) and (1) by discharging two new employees because of their union activity (R. 34-36). This finding is not challenged by petitioner.

the union as the representative of the discharged employees (R. 37-38, 39, 52-53). The Board ordered the company to cease and desist from the unfair labor practices found, to reinstate the discriminatorily discharged employees with back pay, and to bargain with the union as the representative of the discharged employees (R. 37-38, 39, 52-53).

The court of appeals enforced the Board's order in its entirety (Pet. App. i-iv).

ARGUMENT

The question that petitioner seeks to raise—whether the purchaser of a business is free to hire his own employees or must bargain with the representative of the seller's employees regarding their continued employment (Pet. 2, 6)—is hardly presented by the facts of this case. For, the Board—sustained by the court of appeals—found that petitioner had prior to the actual sale caused the employees to be discharged solely in order to avoid dealing with the union that was their representative and after the sale continued to operate the business without material change. It is settled law that where a purchaser takes over a business unchanged he assumes the seller's bargaining obligation. See *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303 (C.A. 5); *National Labor Relations Board* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1 (C.A. 5); *National Labor Relations Board* v. *Armato*, 199 F. 2d 800 (C.A. 7); *John Wiley & Sons* v. *Livingston*, 376 U.S. 542. Nor was the business continuity here broken by the fact that

the employees were discharged prior to consummation of the sale. Since they were discriminatorily discharged, they remained, as a matter of law, employees of the Kelley stores when those stores were taken over by petitioner. See *National Labor Relations Board* v. *Sifers*, 171 F. 2d 63, 66 (C.A. 10); *National Labor Relations Board* v. *Cape County Milling Co.*, 140 F. 2d 543, 546 (C.A. 8). As the court of appeals put it (Pet. App. iii):

> Where, as here, the old employees have been wrongfully discharged, their reinstatement is an appropriate remedy for the unfair labor practice. With such reinstatement ordered, continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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